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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

70-217

No. ~~1760~~

STEPHEN C. ANSTED,

Petitioner,

v.

STANLEY R. RESOR, et al.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

GEORGE T. POPCHEFF
MICHAEL T. DUGAN II
1101 Peoples Bank Building
Indianapolis, Indiana 46204
Telephone: 636-4469
Attorneys for Petitioner

Washington, D. C. · THIEL PRESS · 202 · 393-0625

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES.

The petitioner, STEPHEN C. ANSTED, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in this cause on the 29th day of January, 1971.

OPINION BELOW

The Opinion of the United States Court is not yet reported but printed as Appendix A, *infra*.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit (Appendix A, *infra*) was entered on the 29th day of January, 1971. A timely petition for Rehearing was denied on February 23, 1971.

The jurisdiction of this court is invoked under 28 U.S.C. § 1292(a) and 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the district court erred in holding that the petitioner was accorded due process of law under applicable statutes, military procedures, and regulations.

2. Whether the district court erred in holding that the United States Army complied with statutory and self-imposed regulations in its treatment of the petitioner.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Sixth Amendment to the Constitution of the United States provides as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

The Fourteenth Amendment to the Constitution of the United States provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE QUESTIONS PRESENTED

The important questions presented by this appeal are:

1. Whether the district court erred in holding that the petitioner was accorded due process of law under applicable statutes, military procedures, and regulations.

2. Whether the district court erred in holding that the United States Army complied with statutory and self-imposed regulations in its treatment of the petitioner.

3. Whether the petitioner was denied his Constitutional rights to due process of law by United States Army procedures which did not allow a hearing in the true sense of due process of law.

4. Whether a United States Army regulation allowing for the submission of written evidence only by the petitioner without benefit of oral argument, counsel, cross-examination and witnesses affords proper due process of law under the Constitution of the United States.

5. Whether the right of a reservist to a hearing is a mere privilege which may be abridged by the military or a basic constitutional right guaranteed whether in the military service or not.

STATEMENT OF THE CASE

Stephen Ansted, a member of the United States Army reserve, received "Orders" on October 24, 1969, from the Department of the Army, Fifth United States Army. These orders were issued by Vernon P. Mock, pursuant to authority vested in him by the Secretary of the Army, Stanley R. Resor. Said orders required Ansted to report "not later than 1700 hours, 19 November, 1969 to Fort Leonard Wood, Missouri, for active duty in the armed forces of the United States for a period of 1 year, 5 months, and 22 days." On November 24, 1969, Ansted filed a "Complaint for Declaratory Judgment and Injunctive Relief" asking that the District Court declare the "Orders" as invalid and void and that Resor and Mock be enjoined from enforcing the "Orders". The defendants filed their answer to the complaint on December 29, 1969, and on January 9, 1970, the District Court handed down an entry and memorandum opinion denying Ansted's petition to stay orders, after hearing had been commenced on March 10, 1970. The District Court in its memorandum opinion decided that there was conflicting evidence as to the treatment and communication received by Ansted from the Army. The court then ordered the defendants to make available to Ansted all procedures which the Army had established for review of the orders to involuntary active duty, and stay the order to active duty until January 26, 1970. Hearing was held in the District Court on March 10, 1970, at which evidence was heard and past hearing briefs thereafter filed. On March 16, 1970, the District Court handed down an entry denying the petition to stay the execution of the orders. Accompanying the District Court's entry was a memorandum opinion concluding the Ansted was accorded due process under applicable statutes, military procedures and regulations and that the Army followed its self-imposed regulations.

REASONS FOR GRANTING THE WRIT

The petitioner earnestly contends that the District Court erred in finding that Ansted was afforded due process of law under applicable statutes, military procedures and regulations.

Due process of law as guaranteed by the Constitution must be considered in the context of its application.

> "Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding and the possible burden on that proceeding, are all considerations which must be taken into account." *Hannah v. Larche* (1960), 363 U.S. 420, at page 442.

Particularly important is the relationship of the regulation or statute being imposed to the individual interest being affected. The law is clear in the United States that where the private interest being affected is a mere privilege and not necessarily a right or vested interest, then the Courts will not adhere to strictly to the procedural requirements that due process demands. For example, two basic elements of due process are relaxed, notice and hearing, and not constitutionally required when the private interest affected is only a privilege consisting of employment for the government. *Cafeteria Workers v. McElroy* (1961), 367 U.S. 886 at page 895. The private interest must be characterized. In this case it is apparent that Ansted's military duty is vastly more significant than a mere privilege and carries with it grave potential consequences for the individual. Particularly in times of warfare, involuntary active duty carries with it the interruption for long periods of careers and even injury or death. See, *United States v. Beltram* (D.C. Cal. 1969), 306 F.Supp. 385, 387.

Further, while it is true as pointed out in *United States v. Robel* (1967), 389 U.S. 253 at page 270, that Congress may regulate, "indiscriminately", nonetheless the impact of each regulation upon basic constitutional rights must never

be ignored. Even vagueness and indefiniteness in regulatory standards has been tolerated by the courts where the effect on fundamental rights was not so severe, *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421. But, . . . "The area of permissive indefiniteness narrows . . . when the regulation . . . potentially affects fundamental rights," *United States v. Robel, supra.* In this cause the existence, therefore, of military regulations does not necessarily constitute an area devoid of basic constitutional guarantees. The effect of the Army orders here is of the highest order as to Ansted and accordingly must be viewed with a regard for higher standards of procedural guarantees.

Without question, "The fundamental requisite of due process of law is the opportunity to be heard," *Grannis v. Ordean* (1914), 234 U.S. 385, 394. The hearing itself must be "at a meaningful time and in a meaningful manner" to satisfy the insistence by the Courts for a hearing, *Armstrong v. Manzo* (1965), 380 U.S. 545, 552. Again and again the Courts have considered the necessity of a hearing a prerequisite to the application of due process, *In Re Murchison* (1953), 349 U.S. 133, 136. The courts have long abhorred unilateral judgments by magistrates or administrative offices without regard to the right of the individual to be heard. Recent decisions by the United States Supreme Court emphasize that the nature of the hearing must be actually fair and open, and the mere appearance of processes and procedure granting due process may be only shams. In *Goldberg v. Kelly* (1970), ____ U.S. ____, 125 L.Ed. 2d, 287 the Court indicated strongly that "the opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard." *Goldberg v. Kelly, supra,* 299. The court considered the practice by which individuals are given an opportunity to submit written evidence and submissions and found them to be an "unrealistic option" cleverly sidestepping the requirement for a fair and unbiased hearing, *Goldberg v. Kelly, supra;* 299. More particularly the court in *Goldberg* at page 300 continued:

> ". . . written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important."

Further, the written submission totally ignores the essential ingredient of due process found in the opportunity to confront and cross-examine adverse witness, See *ICC v. Louisville & N.R.R. Co.* (1913), 227 U.S. 88, 93, 94; *Willner v. Committee on Character and Fitness* (1963), 373 U.S. 96, 103-104.

The court in *Goldberg* cites *Greene v. McElroy* (1959), 360 U.S. 474, 496-497 which is particularly pertinent here:

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurors or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment . . . . This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but also in all types of cases where administrative . . . actions were under scrutiny."

The government cited in their "Post Hearing Brief" (Appendix C) the procedures followed in relation to Ansted. There the Appeal Board did not hold a hearing in the true sense of due process of law but instead merely reviewed Ansted's military personnel records and any evidence Ansted might have submitted in writing. No provision under the

applicable regulation, AR 135-91, requires that the plaintiff be represented by counsel, that he have the right to be confronted by witnesses and cross-examine them or that he have the right to subpoena witnesses. The defendant's bold assertion that the Board "acted in full compliance" does not excuse the fact that the procedure used offers no more in the way of basic constitutional guarantees than did the procedures used in the subject of the *Goldberg* Decision. A reservist, not intimately knowledgeable as to the vast and intricate regulations that surround the Army is in no better position to submit written evidence only, than is the welfare recipient at the mercy of a complex social agency. Ansted's rights to due process could only be satisfied by a hearing in the true sense of the word, and not by a military board sitting without benefit of oral argument, counsel, cross-examination; and witnesses. The Board's recommendation that the plaintiff's appeal be disapproved bears with it the unimpenetrable veneer of a decision founded upon reasoning known only to the decision makers. No record of argument, witnesses, or testimony is present to justify the decision of the Board. The Court in *Goldberg* emphasized that . . . "the decision maker's conclusion . . . must rest solely on the legal rules and evidence adduced at the hearing" . . . (and) . . . "an impartial decision maker is essential," *Goldberg v. Kelly, supra*, at page 301. In this cause in the absence of a hearing it cannot be ascertained whether the Board bothered to follow legal rules and evidence in its decision at all. Only the resultant recommendation faces the reservist affected by the ruling.

The government contends that the plaintiff Ansted, as a reservist, does not need to be afforded the same rights and privileges of any private citizen in the United States. Relying substantially upon the case of *Raderman v. Kaine*, 411 F.2d 1102 (2d Cir. 1969) the government contends that Ansted must by virtue of his reserve status relinquish many constitutional rights. However, the *Raderman* case is clearly distinguishable from the instant cause. In *Raderman* the issue surrounding the reservist in that cause was whether or

not Raderman exhibited a "neat and soldierly appearance for a reservist". *Raderman, supra,* at page 1102. There the reservist was an agent for a rock and roll band and wore long hair as a part of his employment image. The court clearly defined the issue of the case as whether the Army had the right to determine what the correct appearance of a reservist should be. On this rather minor point the court cited *Smith v. Resor,* 406 F.2d 141 in determining that "correct appearance of reservists is . . . within the jurisdiction of the Army". The court continued to elaborate by asking, "Does being in the Army curtail or suspend certain constitutional rights? The answer is unqualifiedly yes", *Raderman, supra* at page 1104. But the *Raderman* case does not "discuss the very point raised" as the government asserts in the brief, Appellee's Brief, page 8. The Court in that cause clearly distinguished the relatively minor question of the appearance of a reservist to the far more fundamental question of the right to a hearing. Citing *Greene v. McElroy,* 360 U.S. 474 (1959) the court asserts the difference in issues in that "the *Greene* case involved the question of whether an engineer, who for years had had security clearance and had worked for many defense projects, could be denied such clearance on the basis of confidential informant testimony *without the opportunity to confront and cross-examine his accuser. Raderman, supra* at page 1106" (emphasis added). The *Greene* case, not *Raderman* presents the issue before this court. Whether a reservist is entitled to a hearing in the full sense of due process of law is the true issue here.

The courts have again and again indicated that the private interest to be protected must be characterized as a private or public interest or a mere privilege in order to determine whether protection is necessary, *Cafeteria Workers v. McElroy,* 367 U.S. 886 (1961) at page 896.

A recent case is illuminating in its application of this characterization of interests. In *Dash v. Commanding General Fort Jackson, South Carolina,* 307 F.Supp. 849 (1969), the court reviewed the basic question of whether regular

Army personnel enjoyed the same constitutional rights of other citizens in regards to free speech. The Court began: "At the outset it should be noted that a serviceman's right of free speech is not absolute. With his induction into military service, he necessarily accepts some abridgement of his right of free speech", *Dash, supra* at page 852. The Court continues that: "To a certain extent, at least the military sector of society must function outside the realm of democratic principles, including the freedom of expression", *Dash, supra,* at page 852, citing: Emerson *Toward a General Theory of the First Amendment,* 72 Yale L. Journal 877 (1963).

But in the instant case the court reminds itself that regardless of the change of status of the individual, restrictions placed upon him must be viewed carefully and scrutinized with attention to the Constitutional guarantees of *all* citizens. For example ". . . where First Amendment rights are involved, the issue always involves the balancing by the Courts of the competing private and public interests at stake in the particular circumstances", *Emerson, supra* at page 912.

Even the Court of Military Appeals in applying the case of *Burns v. Wilson,* 346 U.S. 137 (1953) admitted that "servicemen have all the protections of the Bill of Rights except as are expressly or by necessary implication not applicable by reason of the peculiar circumstances of the military", *Dash, supra* at page 854.

It is the characterization of the interest involved and its context within the military structure which provides the test by which the courts may decide to protect or not to protect certain rights.

Said the court in *Dash, supra:*

> "The right (of the military) to restrict, however, must no doubt be kept within reasonable bounds; it is not, and cannot be a completely limitless power" . . . "and, however hesitant they may be to 'intrude', Courts will be available to determine whether there is a reasonable basis for such restric-

tions as may be placed on the serviceman's right of free speech by the military establishment", at page 854.

The court in *Dash* designed a test which is of value here. They reasoned that the activity of the serviceman could not be limited by the military casing in which he was housed unless that activity represented "a clear danger to military loyalty, discipline or morale of the military personnel", at page 858. There the serviceman urged opposition to the military and to the war effort, and thereby disrupted the military structure. But even in *Dash* the court looked to the possible disruption of fellow military personnel by the defendant and not simply whether the actions of the serviceman were distasteful or unpleasant to the military service itself.

In the instant case it is clear that Ansted, not yet even a serviceman, but only a reservist, cannot be characterized as a danger of any kind to the military itself. The right to a fair hearing is so basic as to transcend the assumption that the military may simply do as it pleases with its personnel. *Goldberg v. Kelly*, 397 U.S. 254 (1970) expresses powerfully the concept that basic fundamental rights such as a true hearing are essential in any reasonable function of government. The duty of the government of the United States to promote the general welfare of its citizens is just as basic as the duty of the government to provide for the common defense of the nation. *Nevertheless* the courts will not allow governmental units, whether they be welfare agency or local draft board, to gallop roughshod over basic constitutional rights carrying the banner of governmental obligation. The right of Stephen Ansted to a true hearing, bearing all the fruits of due process, cannot represent a disruptive or dangerous issue to the military. As he passes from private citizen to soldier, Ansted's rights do not simply drop away at his first contact with the military establishment. As characterized in the Appellant's brief, the ramifications of military service are severe and serious. The application of that service, therefore, cannot be administered with any less

reasonableness and fairness than the seriousness of its conclusion.

CONCLUSION

It is respectfully urged that this Honorable Court grant Certiorari in this cause, so that just may be done to this petitioner, all as hereinabove set out.

Respectfully submitted,

GEORGE T. POPCHEFF
MICHAEL T. DUGAN II
Attorneys for Petitioner

APPENDIX "A"

IN THE
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 18352

STEPEHN C. ANSTED,

Plaintiff-Appellant,

vs.

STANLEY R. RESOR,
Secretary of the Army, and
VERNON P. MOCK,
Commanding General, Fifth United States Army, Fort Sheridan, Illinois.

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

January 29, 1971

Before Fairchild and Kerner, Circuit Judges, and Campbell, Seniro District Judge.

Kerner, Circuit Judge. Plaintiff-appellant, Stephen C. Ansted, brought suit in the district court for declaratory judgment to determine the lawfulness of orders commanding him, a member of the Army Reserve, to involuntary active duty for failure to satisfactorily attend required active duty training. The complaint requested that the district court preliminarily and permanently enjoin the defendants, Army officials, from taking any enforcement action through their officers, agents, and subordinates, with respect to said orders and to declare the active duty orders invalid, void and of no effect.

On May 7, 1969, Ansted was ordered to report for a fifteen-day active duty training period with his reserve unit. Ansted failed to comply with the orders and on June 16, 1969, the appellant's unit commanding officer recommended to higher authority that Ansted be involuntarily ordered to active duty pursuant to Army Regulation No. 135-9 for unsatisfactory participation in the Army Ready Reserve. On October 11, 1969, orders to involuntary active duty were issued directing plaintiff to report not later than November 19, 1969, to Fort Leonard Wood, Missouri, for a period of active duty of one year, five months, and twenty-two days.

The district court judge refused to review the exercise of Army discretion which determined that: (1) plaintiff was physically fit for active duty, and (2) that plaintiff was not properly excused from the fifteen-day active duty reserve training period. Instead, the district judge chose to treat plaintiff's law suit as a mandamus action, see *Smith v. Resor*, 406 F.2d 14 (2d Cir. 1969), and decided that the evidence before him was unclear as to whether plaintiff was afforded all of his administrative rights pursuant to the Army's own regulations, and ordered the defendants to make available to the plaintiff all the procedures which the Army has established for review of the orders to involuntary active duty. The district judge further ordered that plaintiff's orders to active duty be stayed to allow plaintiff to institute an appeal within the Army's procedural structures.

Consequently, plaintiff, pursuant to Army regulations, submitted his request for appeal of his orders to involuntary active duty to his unit commander who forwarded it to the Commanding Officer, United States Army Components Personnel Center. Pursuant to this request, an Army Appeal Board was convened and the Board, after reviewing plaintiff's military personnel records, the letter of appeal and several forwarding command endorsements, recommended that plaintiff's appeal be disapproved. This recommendation was ratified by the convening authority.

Subsequently, Ansted returned to the district court with a petition to further stay his orders past the date the district judge had set to allow Ansted to avail himself of Army procedures. Ansted alleged in his petition for stay that the Army appeal procedures denied him a hearing before the board with assistance of counsel, right of confrontation, and cross-examination and thus were not commensurate with due process, and violated plaintiff's constitutional rights. The district judge found that the Army regulation for appealing involuntary orders to active duty, AR 135-91(20), did not provide for a hearing and other correlative incidents, but provided that appeal should be determined on the basis of written application. The district judge concluded, however, that the plaintiff "was afforded due process under applicable statutes, military procedures and regulations" and denied the petition for a stay. Ansted appealed and also moved for an emergency stay pending that appeal which this court granted.

The trial judge chose to treat plaintiff Ansted's original complaint challenge, the validity of his orders to involuntary active duty, as a mandamus action. Yet the record on appeal is devoid of any final disposition of plaintiff's complaint and, consequently, we do not have a final order upon which to base our appellate jurisdiction pursuant to 28 U.S.C. § 1291. See e.g., *McMahon v. Johnston*, 163 F.2d 783 (9th Cir. 1947).

We find, however, that Ansted's petition for a stay of his involuntary active duty orders was, in fact, a request to enjoin his orders pending a determination whether the Army appeal procedures deprived him of due process. The district court's denial of the stay order was an interlocutory order refusing an injunction and, therefore, is appealable under 28 U.S.C. § 1292(a).

Directing ourselves to the merits of Ansted's appeal, we hold that plaintiff's constitutional rights were not violated by the absence of a hearing, with representation of counsel, right to subpoena, confront witnesses, and present oral evi-

dence, at his appeal of his involuntary activation orders. Neither the statute providing for the activation of reservists, 10 U.S.C. § 673(a), nor the regulation setting up the activation procedures, AR 135-91, gives an involuntary activated reservist a right to a personal hearing in such an appeal. When Ansted agreed to and signed his enlistment contract, he consented to induction into active service should he fail to participate satisfactorily in the Army Reserves. Cf. *Gionastio v. Whyte*, 426 F.2d 908, 911 (2d Cir. 1970). He also contracted to be subject to the statutes and regulations which provide for the appeal of activation orders. While Army Regulation 135-91 does not provide for a personal hearing on appeal, it allows the appellant to include in his appeal in written form all "appropriate evidence which the applicant may wish to present." We find that this procedure provided reservist Ansted with sufficient protection of his constitutional rights and hold that a full personal hearing was not required as a matter of constitutional law. Cf. *Gionastio v. Whyte*, 426 F.2d 908 (2d Cir, 1970); *Smith v. Resor*, 406 F.2d 141 (2d Cir. 1969); *Morse v. Barwell*, 289 F.Supp. 812, 816, n.4 (D. Md. 1968), aff'd 401 F.2d 544.

Consequently, we affirm the district court's denial of appellant Ansted's petition for a stay. In addition, we assume that since there is not a final judgment on Ansted's original declaratory judgment complaint, the district court will forthwith issue such final order.

AFFIRMED.

CLERK OF THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT.

APPENDIX "B"

PLAINTIFF-APPELLANT'S PETITION FOR REHEARING EN BANC, OR, IN THE ALTERNATIVE, FOR A REHEARING, OR, IN THE ALTERNATIVE, FOR A REMAND TO THE TRIAL COURT

MAY IT PLEASE THE COURT:

STEPHEN C. ANSTED, Plaintiff-appellant, by counsel, respectfully moves for the entry of an Order granting leave for a Rehearing En Banc of this appeal pursuant to Section 46(c) Title 28 U.S.C., or, in the alternative, for a Rehearing, or, in the alternative, for a remand to the Trial Court, and in support thereof says as follows:

I

THE OPINION OF THIS COURT IGNORES THE CONSTITUTIONAL QUESTIONS ARISING OUT OF THE DENIAL OF DUE PROCESS TO THE PLAINTIFF

This Honorable Court has completely missed the important constitutional point arising out of plaintiff's demand for a personal hearing on appeal with reference to Army Regulation 135-91. This arises because of this Court's failure to perceive matters appearing plainly in the record below. Because of this, the Court states (Op. p. 5) that plaintiff-appellant "agreed to and signed his enlistment contract, he consented to induction into active service should he fail to participate satisfactorily in the Army Reserves". While this may be partially true, nevertheless, any Army Regulation and any Article of War is subservient to the Fifth and Sixth Amendments to the Constitution of the United States.

It is obvious that the Military Authorities realized this because footnote 3 on page 5 of this Court's Opinion states: "Army Regulation 135-91 was amended and now presently provides the right to a hearing."

It is difficult to perceive the Court's Opinion that the procedure prior to the amendment provided Reservist Ansted with sufficient protection of his constitutional rights; and furthermore, it is difficult to understand this Court's Opinion "that a full personal hearing was not required as a matter of contractural law or as a matter of constitutional law" (Court's Opinion, p. 5).

Title 10 U.S. Code, Section 673(a) provides as follows:

> "673 Ready Reserve—(2) In time of national emergency declared by the President after January 1, 1953, or when otherwise authorized by law, an authority designated by the Secretary concerned may, without the consent of the persons concerned, order any unit, and any member not assigned to a unit organized to serve as a unit, in the Ready Reserve, under the jurisdiction of that Secretary to active duty (other than for training) for not more than 24 consecutive months."

While, admittedly, that Section does not provide for a Hearing on its face, nevertheless, because of the nature of that Section, a Hearing is required as a matter of law when you take into consideration Sub-Sections (b) and (c).

This Court's Opinion on page 5 states that A.R. 135-91 does not give an involuntary activated reservist a right to a personal hearing in such an appeal, but it is singular that such Regulation was amended and now provides the right to a Hearing. This was obviously done during the pendency of this appeal, which should be considered by this Honorable Court.

The sole question involved in this case appears to be whether the Army Appeal procedure deprived Ansted of due process of law, and the record in this case discloses that he was deprived of due process in violation of the Fifth Amendment.

Obviously, the defendant-Appellees realized this constitutional infirmity when they amended A.R. 135-91, and provided the right to a full Hearing. The fact that the Army

Authorities did this does not preclude the Court from deciding that the prior appeal procedures denied appellant due process, but, on the contrary, there is tangible proof

(a) that said procedural processes existed, and

(b) that the existing regulation at the time of Ansted's suit in the District Court was constitutionally infirm.

We urge that it is a serious miscarriage of justice to deny appellant his now existing rights for a Hearing under amended A.R. 135-91. Such a ruling is shocking to a sense of justice and in good conscience should not be allowed to stand.

CONCLUSION

The Opinion of the Court shows on its face that the Court has either misunderstood or ignored plaintiff's argument. The effect of this is the establishment in this Circuit of precedents which will, among other things, deprive plaintiffs similarly situated of constitutional rights, and will permit involuntary active duty illegally.

This is so undesirable as to respectfully require this Court to sit En Banc to remedy this situation. However, in the alternative, justice demands at least that this Court remand the case to the District Court with appropriate instructions with reference to the application of amended A.R. 135-91, and grant plaintiff his constitutional procedural processes in this Military Appeal.

Respectfully submitted,

/s/ MICHAEL T. DUGAN II

APPENDIX "C"

POST HEARING BRIEF

This case came before the Court for a hearing on March 10, 1970, to inquire into what action plaintiff and defendants had taken to comply with the Court's Order of January 9, 1970, that the defendants make available to the plaintiff all procedures which the Army has established for review of the orders to involuntary active duty.

By letter dated February 3, 1970, (Government Exhibit BB) plaintiff advised the Army that he wished to appeal his orders to involuntary active duty under the provisions of AR 135-91. In his letter the plaintiff requested that he be afforded certain "rights", the right to be represented by counsel, the right to subpoena witnesses and the right to present evidence. Pursuant to thsi lwtter, the Army convened an Appeal Board to consider the plaintiff's case. Said Board was convened pursuant to AR 135-91. A record of the Board proceedings (plaintiff's Exhibit 1A) reveals that the recommendation of the Board was the plaintiff's appeal be disapproved. Said recommendation was approved by the convening authority. A record of proceedings further reveals that the review of plaintiff's case included examination of his military personnel records jacket (DA Form 201), his February 3, 1970 letter of appeal and several forwarding command endorsements. The Board acted in full compliance with AR 135-91. There is no requirement in that Regulation that plaintiff be represented by counsel, that he have the right to be confronted by witnesses and cross-examine same or that he have the right to subpoena witnesses. The plaintiff may present evidence if he desires but he did not do so in his appeal letter and there is no requirement in the Regulation that the Army solicit evidence from him.

The Board was convened and constituted in compliance with AR 15-6. Plaintiff would have the court believe that

the Army was governed by its regulation AR 601-25, however, such is not the case. Paragraph 1-4a of 601-25, states the basic policy for involuntary order to active duty of units and members of the ready reserve applies only when an expansion of the active Army is needed for national security and when authorized by law. AR 135-91 contains that procedures to be followed in plaintiff's situation, that is when there has been unsatisfactory participation in the Army Ready Reserve.

Plaintiff tries to make a central issue of this matter that he did not receive timely notice of the denial of his appeal. He admitted on the witness stand that he did receive a telegram from the Army in the P.M. of March 9, 1970, advising him of the denial of his appeal. Attached hereto is a copy of a letter dated March 4, 1970, to the plaintiff from the Department of the Army and a Certified Mail Return Receipt showing that the letter was delivered March 7, 1970. Said letter advises plaintiff of the denial of his appeal.

Defendants respectfully submit to the Court that they have complied with the Court's Order and have made available to the plaintiff their appeal procedures for review of orders to involuntary active duty. Nothing more is required and no further stays of the plaintiff's orders should be granted by the Court.

Respectfully submitted,

STANLEY B. MILLER,
United States Attorney.

/s/ By ROBERT B. KEENE,
Assistant United States Attorney.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1760

STEPHEN C. ANSTED, PETITIONER

v.

STANLEY R. RESOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, without excuse or authority, failed to attend the fifteen day active duty training with his reserve unit and was therefore ordered to involuntary active duty pursuant to Army Regulation No. 135–91 for unsatisfactory participation in the Army Ready Reserve.

The district court denied petitioner's motion for a stay of these orders pending a determination whether the Army appeal procedure afforded him due process.[1]

[1] The district court had previously stayed the order to active duty to allow petitioner to institute an administrative appeal within the Army. Thereafter an Army Appeals Board was convened at petitioner's request. The Board, after reviewing peti-

The court of appeals, treating the denial of the stay as an interlocutory order refusing an injunction, affirmed, holding that the Army procedure provided petitioner with sufficient protection of his constitutional rights and that a full hearing was not constitutionally required.

Neither the relevant statute, 10 U.S.C. § 673(a), nor the regulation, A.R. 135–91, gives a reservist a right to a personal hearing. However, the regulation does allow a reservist to submit in writing all appropriate evidence that he may wish to present. This procedure is more than adequate to permit a reservist who has failed to attend training with his unit to present his reason for the absence, and the court below correctly held that this satisfies due process. See *Gionastio* v. *Whyte,* 426 F. 2d 908 (C.A. 2), certiorari denied, 400 U.S. 941; *Morse* v. *Boswell,* 289 F. Supp. 812, 816 n. 4 (D. Md.), affirmed, 401 F. 2d 544 (C.A. 4), certiorari denied, 393 U.S. 1052.

Furthermore, since petitioner did not submit a timely reason for his absence from the training session, the unit commander was compelled to conclude that petitioner's non-appearance at the active duty training constituted unsatisfactory participation. Army Regulations provide that an unexcused absence from annual training constitutes unsatisfactory service, and that excuses for an absence must be received within 14 days of the absence. A.R. 135–91, paras. 9, 11. Under

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tioner's military personnel records, petitioner's letter of appeal and several forwarding command endorsements, recommended that petitioner's appeal be disapproved. This recommendation was ratified by the convening authority.

these circumstances there is no doubt about petitioner's default in his reserve obligation. Petitioner, therefore, has not been prejudiced by the absence of a formal hearing.

For the foregoing reason, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1971.

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IN THE

Supreme Court of the United States

No. 70-217

STEPHEN C. ANSTED,

Petitioner,

v.

STANLEY R. RESOR, *et. al.*,

Respondent.

PETITION FOR A REHEARING AFTER DENIAL OF CERTIORARI

GEORGE T. POPCHEFF
MICHAEL T. DUGAN II
1101 Peoples Bank Building
Indianapolis, Indiana 46204
Telephone: 636-4469

Attorneys for Petitioner

... D.C. THIEL PRESS 202 393 0625

IN THE

Supreme Court of the United States

No. 70-217

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Petitioner,

v.

STANLEY R. RESOR, *et. al.*,

Respondent.

PETITION FOR A REHEARING AFTER DENIAL OF CERTIORARI

Appellant-petitioner, Stephen C. Ansted, hereby petitions this Honorable Court for a rehearing after the denial of his Petition for Certiorari dated October 12, 1971, pursuant to Rule 58 of the Rules of this Court.

Petitioner asks for rehearing on the following grounds:

That the respondent, United States Army, has in 1971, changed its regulations pertaining to this case. Regulation AR135-91 has been revised providing for a hearing to be granted to a reservist in a situation such as that which faced the petitioner. This action by the respondent reinforces the

case of the petitioner for a hearing to deny the petition that right which the respondent itself has deemed necessary would promote an injustice against the petitioner. Further, that the decision in *Goldburg v. Kelly* (1970) ___ U.S. ___, 125 L.Ed.2d 287 is the substantial case in point providing for the proper due process to be afforded a citizen in a confrontation with a governmental agency. The contention by the government that submission in writing of evidence by the petitioner is adequate to provide the petitioner with due process is false.

WHEREFORE, petitioner prays that his Petition for Rehearing be granted and that such rehearing be granted on his original petition for certiorari.

Respectfully submitted,

George T. Popcheff

Michael T. Dugan II

Attorneys for Petitioner

1101 Peoples Bank Building
Indianapolis, Indiana 46204
Telephone: 636-4469

November 5, 1971

CERTIFICATE OF COUNSEL

Counsel for the petitioner herein attests to the Court that the foregoing Petition for Rehearing filed pursuant to Rule 58 of the Rules of the Supreme Court of the United States was presented in good faith and not for the purposes of delay. Further, that the foregoing petition is restricted to the grounds set forth in said petition.

Respectfully submitted,

George T. Popcheff

Michael T. Dugan II

Attorneys for Petitioner

1101 Peoples Bank Building
Indianapolis, Indiana 46204